Supreme Court, U. S.
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NO. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

FREDDIE FRANK MITCHELL,
Petitioner,

V.

STATE OF GEORGIA,
Respondent.

ON WRIT OF CERTIORARI
TO THE COURT OF APPEALS FOR THE
STATE OF GEORGIA

PETITION FOR A WRIT OF CERTIORARI

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The Petitioner, Freddie Frank Mitchell, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals of the State of Georgia in this case.

QUESTIONS PRESENTED

Whether Georgia Code Section 26-2910 (1968), a criminal statute defining reckless conduct, is so vague and indefinite that any penalty prescribed for its violation constitutes a denial of due process as required by the due process clause of the Fourteenth Amendment.

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OPINION BELOW

The opinion of the Court of Appeals of Georgia is reported as *Mitchell v. State*, 154 Ga.App. 399, ___ S.E.2d _____ (1980) and appears in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals of Georgia was entered on April 9, 1980, affirming Petitioner's conviction dated July 25, 1979. A motion for rehearing was denied on April 24, 1980. Petitioner then applied for a writ of certiorari to the Supreme Court of Georgia. The writ was denied on June 11, 1980. A motion for reconsideration was filed and denied on June 24, 1980. This petition for certiorari was filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. §1257 (3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Constitutional and statutory provisions are as follows:

United States Constitution, Fourteenth Amendment:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Georgia Code §26-2910 (1968):

A person commits a misdemeanor when he causes bodily harm to or endangers the bodily safety of another person by consciously disregarding a substantial and unjustifiable risk that his act or omission will cause the harm or endanger the safety, and the disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation.

Georgia Code §26-1103(a) (1968):

(a) A person commits involuntary manslaughter in the commission of an unlawful act when he causes the death of another human being without any intention to do so, by the commission of an unlawful act other than a felony. A person convicted under this subsection shall be punished by imprisonment for not less than one year nor more than five years.

STATEMENT OF THE CASE

As the facts reveal, one Geraldine Gaston Mitchell, a Fulton County resident, died on or about May 9, 1979, between the hours of 5:00 P.M. and 6:00 P.M. (T-20, T-105, T-106). The Petitioner, Freddie Frank Mitchell, was subsequently arrested and charged with her death (T-86, T-142). The indictment charged Petitioner with involuntary manslaughter and provided in pertinent part that Petitioner:

> did unlawfully and without any intention to do so, kill Geraldine Gaston Mitchell, a human being, while accused was engaged in the commission of

> the following unlawful act, in that accused, having possession of a pistol, did endanger the bodily safety of the said Geraldine Gaston Mitchell who was present by consciously disregarding a substantial and unjustifiable risk that his act would cause harm and endanger the safety of the said Geraldine Gaston Mitchell, the disregard constituting a gross deviation from the standard of care which a reasonable person would exercise in said situation, did allow said pistol to point in the direction of the said Geraldine Gaston Mitchell, and while so pointing did pull the trigger on said pistol, causing it to fire and shoot the said Geraldine Gaston Mitchell; thereby killing the said Geraldine Gaston Mitchell

(T-2, T-3). Petitioner was subsequently tried and sentenced to five years in prison on July 25, 1979.

Geraldine Gaston Mitchell was Petitioner's common law wife and had lived with him for two years prior to her death (T-86). On May 9, 1979, Petitioner picked up Geraldine Mitchell at work, at which time they returned to their apartment (T-135, T-136). Upon reaching their apartment, an argument ensued between the two parties in their bedroom (T-136). Petitioner kept a gun under the bed, which Mrs. Mitchell attempted to grab (T-137). Petitioner grabbed the gun first (T-137). Mrs. Mitchell then left the room (T-137). Petitioner remained in the bedroom, but locked the door (T-137, T-139). Mrs. Mitchell came back down the hall and began beating on the door with a hammer and grill (T-140). The door popped open; Petitioner pushed it back to close it and again locked it (T-140). Petitioner held the door closed, during which time he still

had the gun in his hand (T-140). The door again popped open, and in the process of shutting it, the gun went off (T-140, T-141). Mrs. Mitchell screamed that she had been shot; Petitioner opened the door and found her standing in the hallway bleeding (T-141). He immediately rushed her to the hospital where she died later that same evening (T-141).

Prior to trial, Petitioner filed a demurrer to the above quoted indictment (R.388). In the demurrer, Petitioner challenged the constitutionality of the Georgia reckless conduct statute, Georgia Code Section 26-2910 (1968), on the grounds that the statute was violative of the due process clause of the Fourteenth Amendment to the United States Constitution (T-6). The trial court overruled the demurrer (T-6), and the case proceeded to trial.

At the close of all the evidence, the trial judge charged the jury on involuntary manslaughter (T-184), and several misdemeanors falling within the scope of unlawful act involuntary manslaughter under Georgia Code Section 26-1103(a) (1968) (T-185). One of the misdemeanors charged on was reckless conduct as defined by Georgia Code Section 26-2910 (1968) (T-186). The jury retired, and after some deliberation, they were unable to reach a verdict (T-189). Consequently, they returned to the Court and asked the trial judge the following questions:

> "on what primary charges can we find a verdict? on what lesser charges can we render a verdict? difference between the charged?"

(T-189, T-228). The jury was recharged (T-191-193), subsequently returning a verdict of guilty but miscit-

ing the code section which they found Petitioner guilty of violating (T-196). (The jury cited the code section as "26-2190" when presumably they meant to cite Georgia Code Section 26-2910, the reckless conduct statute.) Upon the trial judge's instructions, the code section was struck from the verdict (T-203). Petitioner was sentenced to five years imprisonment (T-205).

Petitioner appealed his conviction to the Supreme Court of Georgia on four enumerations of error by the trial court. One of these enumerations was a challenge to Georgia Code Section 26-2910, the reckless conduct statute, on vagueness grounds. The Supreme Court of Georgia transferred the case to the Georgia Court of Appeals. The state court of appeals summarily rejected the challenge to the reckless conduct statute relying on an earlier Georgia Supreme Court decision, *Horowitz v. State*, 243 Ga. 441, 254 S.E.2d 828 (1979) and affirmed Petitioner's conviction on April 9, 1980. A motion for rehearing was denied on April 24, 1980. Petitioner then applied for writ of certiorari to the Supreme Court of Georgia. The writ was denied on June 11, 1980. A motion for reconsideration was filed and denied on June 24, 1980.

Because of the substantial constitutional claims raised by this proceeding, Petitioner has invoked the jurisdiction of this Court under 28 U.S.C. §1257 (3) to review the judgment of the court below.

REASONS FOR GRANTING THE WRIT

1. The decision below conflicts with decisions of this Court as to the standards which a criminal

statute must meet to satisfy the requirements of the due process clause of the Fourteenth Amendment.

It is established that a law fails to meet the requirements of the due process clause of the Fourteenth Amendment if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits or leaves judges and jurors free to decide without any legally fixed standards what is prohibited and what is not in each particular case. *Giaccio v. Pennsylvania*, 382 U.S. 399 (1966); *Baggett v. Bullitt*, 377 U.S. 360 (1964); *Lanzetta v. New Jersey*, 306 U.S. 451 (1939). The Georgia reckless conduct statute, Georgia Code Section 26-2910 (1968), is constitutionally defective in both senses. This criminal statute does not provide fair warning of the type of conduct it prohibits, nor does it provide an ascertainable standard for judging guilt thereunder. Consequently, the Georgia Court of Appeals, in its affirmance of the trial court, subverted these fundamental principles of due process by rejecting a vagueness challenge to the reckless conduct statute, Georgia Code Section 26-2910 (1968).

A. The Georgia reckless conduct statute, Georgia Code Section 26-2910, is unconstitutionally vague as written.

It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. *Grayned v. Rockford*, 408 U.S. 104 (1972). A statute must be sufficiently explicit in its description of the acts, conduct or conditions required or forbidden, to prescribe the elements of the offense

prohibited with reasonable certainty. *Beauharnias v. Illinois*, 343 U.S. 250 (1952). Implicit within these requirements is the premise that the law must be one that carries an understandable meaning with legal standards that courts can enforce. The Georgia reckless conduct statute, as written, does not even begin to meet these constitutional requirements.

The statute states:

> *Reckless conduct*
>
> A person commits a misdemeanor when he causes bodily harm to or endangers the bodily safety of another person by consciously disregarding a substantial and unjustifiable risk that his act or omission will cause the harm or endanger the safety, and the disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation.

Ga. Code §26-2910 (1968). This criminal statute, on its face, does not provide a description of the acts or conduct forbidden, nor does it provide the elements of the offense prohibited with reasonable certainty. The language of the statute prohibits any reckless act which might endanger the safety of another person. The conduct prohibited by this criminal statute is so all-inclusive and generalized that it fails to give a person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. This Court has repeatedly stated that criminal statutes which fail to give due notice that an act is criminal before it is done are unconstitutional deprivations of due process of law. *Papachristou v. Jacksonville*, 405 U.S. 839 (1972); *United States v. Harriss*,

347 U.S. 612 (1954); *Jordan v. De George*, 341 U.S. 223 (1951); *Lanzetta v. New Jersey*, 306 U.S. 451 (1939); *United States v. Cohen Grocery Co.*, 255 U.S. 81 (1921). However, this Court has upheld statutes challenged on vagueness grounds where scienter is an element of the offense. *Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337 (1952); *Screws v. United States*, 325 U.S. 91 (1945). Measured by this standard, the statute again fails to pass constitutional scrutiny. Clearly, the crime of reckless conduct is not a specific intent crime. Consequently, the statute cannot be upheld on this basis.

Another aspect of the statute's vagueness is that due to its all-inclusive and generalized definition of reckless conduct, the statute is subject to arbitrary and discriminatory enforcement. This risk of abuse in the administration of the law is present in two forms. One risk is that the law may be arbitrarily applied by police and prosecution officials. *Papachristou v. Jacksonville*, 405 U.S. 839 (1972). A reckless conduct prosecution may be merely the cloak for a conviction which could not be obtained on the real, but undisclosed, grounds for the arrest. The other risk is that the statute may be so unclear that a trial court cannot properly instruct a jury. A statute is unconstitutionally vague when it leaves judges and jurors free to decide what is or is not prohibited conduct in a particular case on an ad hoc and subjective basis. *Giaccio v. Pennsylvania*, 382 U.S. 399 (1966). The Georgia reckless conduct statute contains no standards at all, nor does it place any conditions of any kind upon the jury's power to find an accused guilty of reckless conduct. Under this statute, jurors must make determinations of the crucial issue

of whether or not the statute has been violated based upon their own notions of what reckless conduct is. Thus, the statute leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case.

B. Subsequent state court interpretations of the statute have failed to provide standards and guidelines that cure the statute's constitutional deficiencies.

Prior to the statute's enactment in 1968, no general statute punishing reckless conduct existed. P. Kurtz, *Criminal Offenses in Georgia* (1980). Since the statute's passage, few cases construing Georgia Code Section 26-2910 (1968) have been decided. *Crawford v. State*, 245 Ga. 94, ____ S.E. ____ (1980); *Horowitz v. State*, 243 Ga. 441, 254 S.E.2d 828 (1979); *McCane v. State*, 147 Ga.App. 730, 250 S.E.2d 181 (1978); *Hiatt v. State*, 144 Ga.App. 298, 240 S.E.2d 894 (1977), cert. denied; *Smith v. State*, 142 Ga.App. 814, 237 S.E.2d 220 (1977); *Harshaw v. State*, 134 Ga.App. 581, 215 S.E.2d 337 (1975). However, the above cases fail to provide any standards that cure the statute's unconstitutional vagueness. *Crawford v. State*, 245 Ga. 94, ____ S.E.2d ____ (1980) (use of a gun in self-defense when such use is excessive force constitutes reckless conduct); *Horowitz v. State*, 243 Ga. 441, 254 S.E.2d 828 (1979) (upholding the statute on the grounds that it is not void for vagueness. Reckless conduct was driving a car in a residential area in excess of the speed limit. Defendant lost control of the car and skidded towards a child standing in its front yard); *McCane v. State*, 147 Ga.App. 730, 250 S.E.2d

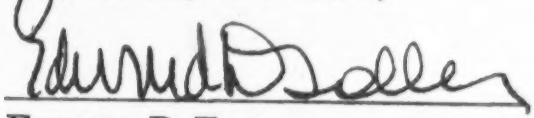
181 (1978) (reckless conduct was shooting at and in the direction of an occupied mobile home); *Hiatt v. State*, 144 Ga.App. 298, 240 S.E.2d 894 (1977) cert. denied (reckless conduct was pulling an auto in front of traffic); *Smith v. State*, 142 Ga.App. 814, 237 S.E.2d 220 (1977) (reckless conduct was entering a trailer under circumstances where the defendant had to break a window to obtain entrance); *Harshaw v. State*, 134 Ga. App. 581, 215 S.E.2d 337 (1975) (reckless conduct was endangering the safety of individuals present when defendant shot someone).

The state courts' opinions in these cases were framed to apply the statute to the defendants in the case then under consideration. On the whole, these cases cannot be purported to provide any interpretation of the statute which would be generally applicable. Consequently, the statute is constitutionally invalid both as written and explained by the Georgia courts.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals of Georgia.

Respectfully submitted,



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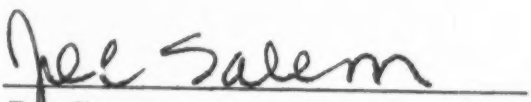

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APPENDIX

GEORGIA COURT OF APPEALS
Mitchell v. State, case no. 59424
decided April 9, 1980

59424. MITCHELL v. THE STATE. 29-45

DEEN, Chief Judge.

The defendant was indicted, tried and convicted of involuntary manslaughter in the commission of an unlawful act in that he pointed a pistol at another (a misdemeanor violation of Code § 26-2908) and was guilty of reckless conduct (as specified by Code § 26-2910, another misdemeanor) in the course of which he caused the pistol to fire, killing a person on the other side of his bedroom door. His appeal, challenging the constitutionality of Code § 26-2910, was transferred by the Supreme Court to this court. *Held:*

1. The issue of constitutionality of this statute was decided contrary to the contentions of the appellant in *Horowitz v. State*, 243 Ga. 441 (SE2d) (1979). This also disposes of the remaining demurrers because the indictment did charge a violation of criminal law, specifying the unlawful acts of reckless conduct and pointing a pistol at another, as a result of which the victim was fatally wounded.

2. Although the unlawful acts of pointing a gun and reckless conduct were alleged conjunctively in the indictment, proof of the homicide as a result of either of them is sufficient to authorize a conviction. "Where under a penal statute an offense may be committed by the doing of any one of several forbidden acts, a conviction may be had upon an indictment which in a single count charges the accused with the commission of

two or more of them, if there be satisfactory proof that he committed at least one of the acts therein specified." *Brazil v. State*, 117 Ga. 32 (43 SE 460) (1902). The court properly instructed the jury that they could return a verdict of guilty if either of the unlawful acts charged was supported by evidence.

3. One may not put questions even to an expert witness so as to call for his opinion on the exact ultimate issue before the jury. *Hamilton v. United States*, 73 F2d 357. While such an expert may give aid to the jury he cannot, under the guise of giving testimony, state a legal conclusion as to a matter at issue. *Travelers Ins. Co. v. Thornton*, 119 Ga. 455 (46 SE 678) (1904); *Hartford Accident & Indemnity Co. v. Camp*, 69 Ga. App. 758 (26 SE2d 679) (1943). The witness may not, on a vital matter, enter the domain of the jury, whose right and duty it is to form its own conclusions uninfluenced by the opinion of others. *Harris v. State*, 188 Ga. 745, 746 (1) (4 SE2d 651) (1939). See also *Harris v. State*, 221 Ga. 398 (144 SE2d 769) (1965); *Garrett v. State*, 147 Ga. App. 500 (249 SE2d 315) (1978). It was not error to exclude on objection an opinion of a member of a city police department who was not present at the time of the homicide as to whether the shooting, in his opinion, was accidental.

Judgment affirmed. Birdsong and Sognier, JJ., concur.

SUPREME COURT OF GEORGIA

Mitchell v. State

case no. 36412

Motion for Reconsideration was denied on June 24, 1980.

Clerk's Office, Supreme Court of Georgia

DEAR SIR: ATLANTA JUN 24 1980

The motion for a ~~rehearing~~ reconsideration was denied today:

Case No. 36412. Mitchell v. State

Yours very truly,

MRS. JOLINE B. WILLIAMS, Clerk